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Quietflex Manufacturing Co., L.P. and Sheet Metal Workers Local Union No. 54, AFL-CIO a/w Sheet Metal Workers International Association, AFL-CIO. Case 16-CA-20257

June 30, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On November 16, 2000, Administrative Law Judge Keltner W. Locke issued the attached bench decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed a brief in response to the exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions for the reasons set forth below.

The complaint alleged that the Respondent violated Section 8(a)(1) of the Act by discharging 83 employees for refusing to vacate its parking lot where those employees had engaged in a peaceful 12-hour work stoppage to protest their terms and conditions of employment. The judge dismissed the complaint, finding that the employees' continued refusal to vacate the Respondent's premises, after they were told to return to work or leave, served no protected employee interest and unduly interfered with the Respondent's use of its property.¹ We agree with the judge.

Facts

The Respondent manufactures ducts for the air conditioning industry at its facility in Houston, Texas. Its employees, who are primarily of Hispanic or Vietnamese origin, are not represented by a labor organization. The Respondent does not have a formal grievance procedure.

The relevant facts, as more fully set forth in the judge's decision, establish that 83 of the Respondent's employees gathered in the Respondent's parking lot at 7 a.m. on January 10, 2000,² to press their complaints to management. These 83 employees included employees from all three shifts of the duct department, as well as

some shipping department employees.³ The 83 Hispanic-surnamed employees congregated because, among other things, they were concerned that their Vietnamese coworkers were being paid more and treated better by the Respondent. The 83 employees sought from management a pay raise, improved vacation and holiday pay, and better working conditions.

At 7:15 a.m., the Respondent's vice president, Pete Crane, instructed the 83 employees to return to work. They refused, and instead presented Crane with a letter listing their demands. At 8:30 a.m., the Respondent's human resources manager, Steve Conaway, invited several of the assembled employees to go inside and speak to a manager. They declined, stating that they wanted to communicate as a group.

At 11 a.m., the Respondent's president, W.A. Dan Daniel Jr., addressed the 83 employees. He told them that he had reviewed their letter, and had already met one of their demands by hiring someone to clean the lunch and restrooms. Daniel also stated that while he was not able to grant their requested wage increase, other issues they had raised were open for discussion. In addition, Daniel offered to meet with employees by shift to discuss their demands. The employees refused. They also refused Daniel's offer to meet with delegates of the group. Daniel concluded his comments by notifying the 83 employees that they must either return to work or leave the premises. The employees responded that they would do neither until all of their demands were met.

At 6:15 p.m., Daniel again spoke to the 83 employees in the parking lot. He renewed his offer to meet with delegates of the group, or with shifts of employees. His offers were refused. The employees reiterated that they would not leave the premises until all of their demands were met. Daniel then read a written statement that culminated in the announcement that employees had to leave the Respondent's premises by 7 p.m. or face discharge. Daniel stated that the discharge would not be for refusing to work, but for refusing to leave the property. A Spanish-speaking supervisor then translated Daniel's statement to the employees. In the translated version, the employees were told that they had to leave the premises by 7 p.m. or the police would be called. They were not, however, told that they would be discharged if they failed to leave the property by 7 p.m.

The 83 employees remained in the parking lot, and the Respondent summoned the police at 7 p.m. At 7:15

¹ As stipulated to by the parties, and found by the judge, the 83 employees were discharged for refusing to vacate the Respondent's property, and not for refusing to return to work, which would have been protected activity under Sec. 7. See, e.g., *Molon Motor & Coil Corp.*, 302 NLRB 138 (1991), *enfd.* 965 F.2d 523, 528 (7th Cir. 1992).

² All dates are in 2000 unless otherwise indicated.

³ Some of the 83 employees may not have been scheduled to work during the 12 hours. However, we need not resolve this factual issue, because, as discussed below, the Respondent's actions were prompted by their continued presence on the property, not by a work stoppage.

p.m., a sheriff's deputy arrived and spoke with the employees, and all 83 promptly left.

When the 83 employees attempted to return to work on January 13, they were told that they had been fired. The Respondent subsequently learned that the employees may have misunderstood its final January 10 instructions to leave or be fired. On January 21, President Daniel sent a letter to each employee offering reinstatement, under the same conditions of employment as they enjoyed previously. All 83 employees returned to work on January 24.

The Judge's Decision

The judge found that the employees were acting in concert for their mutual aid and protection and that they had sought changes in wages, hours, and other terms and conditions of employment. In short, the judge found that the employees were engaged in protected concerted activity under Section 7 of the Act. However, applying *Cambro Mfg. Co.*, 312 NLRB 634 (1993), and *Waco, Inc.*, 273 NLRB 746 (1984), and distinguishing *Tri-County Medical Center*, 222 NLRB 1089 (1976), the judge concluded that, while the employees here were entitled to engage in their concerted protest on the Respondent's property for a reasonable period of time, their continued refusal to leave the Respondent's property extended beyond this reasonable time. The judge further found that the employees' continued presence on the Respondent's property after 6:15 p.m., when they were told for the second time to return to work or leave the Respondent's property, served no immediate protected employee interest and unduly interfered with the Respondent's right to control the use of its own premises. *Cambro*, supra, 312 NLRB at 636. Consequently, the judge found that the employees' concerted activity lost the protection of the Act.

The judge emphasized that the Respondent discharged the employees not because they had refused to return to work, but rather because they had refused to leave its premises after a reasonable period of time. He found that, while the employees were entitled to persist in their concerted activity, they had no right to continue to refuse to leave the Respondent's premises. Thus, he concluded that the employees' discharge did not interfere with rights protected under Section 7 of the Act, and he recommended that the complaint be dismissed.

The General Counsel's Exceptions

The General Counsel excepts to the dismissal of the complaint, arguing that *Waco* and *Cambro* are not controlling and that the judge erred by finding that the employees lost their protection under the Act following the Respondent's second request that they leave its premises.

The General Counsel distinguishes the facts in this case, in which he argues that the outdoor work stoppage was minimally invasive, from cases like *Waco* and *Cambro*, where the work stoppage occurred inside the employer's facility, a situation that the General Counsel contends is clearly more disruptive. The General Counsel asserts that this case must be analyzed under *Tri-County Medical Center*, 222 NLRB 1089 (1976), in which the Board found that the employer acted unlawfully in preventing an off-duty employee from distributing union literature in an outside area of its facility.

We find no merit in the General Counsel's exception. Therefore, we agree with the judge, for the reasons set forth below, that the Respondent did not violate Section 8(a)(1) when it discharged 83 employees engaged in a prolonged work stoppage on its property.

The Relevant Precedent

On-the-job work stoppages can be a form of economic pressure protected under Section 7. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 15 (1962). However, not every such work stoppage is protected. *Molon Motor & Coil Co.*, 302 NLRB 138 (1991), enfd. 965 F.2d 523, 525 (7th Cir. 1992). "At some point, an employer is entitled to exert its private property rights and demand its premises back." *Cambro Mfg. Co.*, supra, 312 NLRB at 635. To determine at what point a lawful on-site work stoppage loses its protection, a number of factors must be considered, and the nature and strength of competing employee and employer interests must be assessed. *Cambro Mfg.*, *Ibid.* As the Board stated in *Waco*, supra, "the precise contours within which such [a work stoppage] is protected cannot be defined by hard-and-fast rules. Instead, each case requires that many relevant factors be weighed." 273 NLRB at 746. Further, "the locus of [the] accommodation [between employer and employee rights] . . . may fall at differing points along the spectrum depending on the nature and strength of the respective Section 7 rights and private property rights asserted in any given context." *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976). The primary task of the Board is to achieve that accommodation. *Id.*

Factors that the Board has considered in determining which party's rights should prevail in the context of an on-site work stoppage include:

- (1) the reason the employees have stopped working;⁴
- (2) whether the work stoppage was peaceful;⁵

⁴ For example, in *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 15 (1962), the employees' work stoppage to protest the lack of heat during a harsh winter was held protected.

(3) whether the work stoppage interfered with production, or deprived the employer access to its property;⁶

(4) whether employees had adequate opportunity to present grievances to management;⁷

(5) whether employees were given any warning that they must leave the premises or face discharge;⁸

(6) the duration of the work stoppage;⁹

(7) whether employees were represented or had an established grievance procedure;¹⁰

(8) whether employees remained on the premises beyond their shift;¹¹

(9) whether the employees attempted to seize the employer's property;¹² and

(10) the reason for which the employees were ultimately discharged.¹³

⁵ See *City Dodge Center*, 289 NLRB 194 (1988), enfd. sub nom. *Roseville Dodge Inc. v. NLRB*, 882 F.2d 1355 (8th Cir. 1989), 882 F.2d 1355, 1359 (8th Cir. 1989).

⁶ It is not considered an interference of production where the employees do no more than withhold their own services. *Golay & Co.*, 156 NLRB 1252, 1262 (1966), enfd. 371 F.2d 259, 262 (7th Cir. 1966), cert. denied 387 U.S. 944 (1967); see also *City Dodge Center*, supra fn.5, 882 F.2d at 1358.

⁷ See *Pepsi-Cola Bottling Co.*, 186 NLRB 477 (1970), enfd. 449 F.2d 824, 829-830 (5th Cir. 1979) (in agreeing with the Board that an in-plant work stoppage was protected, the court noted that the employees had been denied the chance to communicate their grievances to management); see also *Golay & Co.*, supra fn.6.

⁸ See *Golay & Co.*, supra fn.6.

⁹ Id. (1½ to 2-hour work stoppage, during which time the employees were non-disruptive, and were waiting for a response to their demands from management, was protected).

¹⁰ See *Liberty Natural Products*, 314 NLRB 630 (1991), enfd. 73 F.3d 369 (9th Cir. 1995) (Board found protected a work stoppage by unrepresented employees working without an established grievance mechanism); *Advance Indus. Div. Overhead Door Corp.*, 214 NLRB 518 (1974), enf. denied in relevant part 540 F.2d 878, 885 (7th Cir. 1976) (Board found activity protected, however, court found unlawful trespass where workers ignored the employer's ordinary grievance procedure and refused to leave the premises after their shifts ended); see also *Cone Mills Corp. v. NLRB*, 413 F.2d 445 (4th Cir. 1969); but see *Pepsi-Cola Bottling Co.*, supra fn.7; *Serv-Air, Inc.*, 162 NLRB 1369 (1967) enfd. 401 F.2d 363 (10th Cir. 1968); *Masonic and Eastern Star Home*, 206 NLRB 789 (1973), enfd. 514 F.2d 894 (D.C. Cir. 1975); and *City Dodge Center*, supra fn.5 (lack of grievance procedure was a factor in finding employee work stoppage protected).

¹¹ See *Pepsi-Cola Bottling Co.*, supra fn.7 (employees protected where disruption was minimal and employees left at the end of their shifts); compare *Peck, Inc.*, 226 NLRB 1174 (1976) (unprotected activity when employees refused to leave lunchroom after their shifts ended).

¹² See *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 252 (1939) (illegal trespass found where employees seized and retained possession of the employer's plant for several days).

¹³ See *Molon Motor & Coil Co.*, 302 NLRB 138 (1991), enfd. 965 F.2d 523, 528 (7th Cir. 1992) (employees' activity protected where they were fired for refusing to return to work, rather than refusing to leave the employer's premises).

Applying the foregoing factors, the Board in *Waco*, supra, found that the employer did not violate Section 8(a)(1) by discharging employees who refused either to begin work as scheduled or leave the employer's premises. 273 NLRB at 746.

The *Waco* Board noted that the employees remained in the lunchroom for at least 3½ hours, after they had been told (like the employees here) by their department manager that he would not meet with all of them as a group and that they must either return to work (in which case the manager would meet with them individually) or punch out and leave the employer's premises. Acknowledging that unrepresented employees, working without an established grievance procedure, have the right under the Act to engage in spontaneous concerted protests concerning their working conditions, the Board nonetheless found that, by the time the employees were discharged, they had "overstepped the boundary of a protected, spontaneous work stoppage, and were occupying the facility in a manner which was unprotected." Id. The Board further noted that the employer had not acted precipitously, and that the employees had ample time to consider the employer's demand that they choose between returning to work or continuing their work stoppage off the employer's premises. Further, the Board found that the employees failed to "communicate the particulars of their grievances so as to facilitate a discussion or possible resolution of their concerns." Id. at 747.

Likewise, in *Cambro*, supra, the Board found that the employer did not violate Section 8(a)(1) by discharging employees who had refused either to return to work as scheduled or leave the employer's premises. The employees remained in the employee dining room or in the adjacent working corridor separating the dining room from the plant manager's office, while continuing to demand to speak to the plant manager or the employer's owner, neither of whom was present in the facility at that time (about 2:30 a.m. through 6 a.m.). 312 NLRB at 634.

The *Cambro* majority found, contrary to the judge, that while the employees had a Section 7 right to protest the employer's failure to consider seniority in selecting the candidate for leadperson training, the on-site work stoppage nevertheless reached a point at which it was no longer a protected means of protest. The employer was thereafter free to discharge the employees for failing to obey its instructions either to return to work or to clock out and leave the plant, without violating Section 8(a)(1). Id. In the employees' favor, the Board noted that the on-site work stoppage was peaceful, that it focused on several specific job-related complaints, and that it caused little disruption of production. Under such circumstances, the employees were entitled to persist in their

on-site protest for “a reasonable period of time.” *Id.* at 636. However, the Board majority reasoned, the situation reached a point at which the employees’ failure to either return to work or leave the premises resulted in forfeiture of the Act’s protection. At that point, the employer was entitled to reclaim the use of its entire premises. *Id.* Further, the Board noted that the employees had ample opportunity to present their grievances pursuant to the employer’s established grievance procedure. Accordingly, further in-plant refusals to return to work “served no immediate protected employee interests and unduly interfered with the employer’s right to control use of its premises.” *Id.*¹⁴

A different result was reached in *City Dodge Center, Inc.*, 289 NLRB 194 (1988), *enfd. sub nom. Roseville Dodge Inc. v. NLRB*, 882 F.2d 1355 (8th Cir. 1989). In finding the work stoppage protected, the Board reasoned that the 2 to 3-hour work stoppage was of limited duration, the employees’ reason for remaining on the premises was to present work-related complaints to the company president, the stoppage was peaceful, and the employees left peacefully after the company president told them to return to work, leave the premises, or face termination. *Id.* at 194. The U.S. Court of Appeals for the Eighth Circuit enforced the Board’s order, additionally relying on the facts that the company had no established grievance procedure and that there was no evidence that the employees seized any portion of the employer’s property, engaged in violent acts, damaged property, or interfered with employees who were working. 882 F.2d at 1358.

Likewise, in *Pepsi-Cola Bottling Co. of Miami, Inc.*, 186 NLRB 477 (1970), *enfd.* 449 F.2d 824 (5th Cir. 1979), the Board adopted the judge’s findings that the employees’ in-plant work stoppage was protected. Enforcing the Board’s order, the Fifth Circuit more explicitly discussed several factors on which it relied in finding the activity protected. Specifically, the court found that the employees did not threaten to carry the work stop-

page over into the next shift, did not hold the premises in defiance of the owner’s right of possession, left immediately when asked to do so by police, did not interfere with the work performance of nonstrikers, had no formal grievance procedure in place, and did not engage in or threaten violence. 449 F.2d at 829.

Analysis and Conclusions

Applying the principles set forth above and applied in *Waco* and *Cambro*, we agree with the judge that the Respondent did not violate Section 8(a)(3) by discharging the 83 protesting employees. Ultimately, those cases seek to balance competing employer and employee rights, focusing on the degree of impairment of the employees’ Section 7 rights if access is denied, compared to the degree of impairment of the employer’s private property rights if access is granted. *Hudgens v. NLRB*, 424 U.S. 507 (1976).

In striking an appropriate balance between the Respondent’s and the employees’ competing interests, the duty of the Board is to accommodate both rights “with as little destruction of one as is consistent with the maintenance of the other.” *NLRB v. Babcock & Wilcox Co.*, 251 U.S. 105, 112 (1956); *Hudgens*, *supra*, 424 U.S. at 520.

Contrary to our dissenting colleague, we find that the Respondent had a tangible property interest in the areas outside its facility. If the Respondent’s property interests were as abstract and nominal as our dissenting colleague suggests, there would be no counterbalance to the employees’ Section 7 rights. The appropriate balancing of these legal rights under the authority of *Babcock & Wilcox* and *Hudgens* requires careful consideration of the nature of these rights and their relative strength under the facts presented.

In this case, certain factors applied by the Board weigh in favor of the employees’ rights. The 83 employees at all times engaged in a peaceful work stoppage. There is no allegation or evidence that they blocked ingress or egress to the Respondent’s facility, disrupted operations at the loading dock, prevented other employees from performing their duties, or sought to deprive the Respondent of the use of its property. They were on the outside, rather than the inside, of the Respondent’s facility. The employees congregated together to present their work-related complaints to the Respondent in a concerted fashion. In addition, the employees were unrepresented and did not have access to any formalized grievance procedure.

We find, however, that the factors favoring the Respondent’s property interests outweigh the above considerations. The 12-hour work stoppage by employees, both on- and off-duty, far exceeded the limited duration of

¹⁴ In *Advance Indus. Div. Overhead Door Corp. v. NLRB*, 540 F.2d 878 (7th Cir. 1976), the Seventh Circuit reversed the Board and found that the employer lawfully discharged five employees who refused to vacate its premises when protesting the early termination of their shift. Finding that the employees concerted activity lost the Act’s protection, the court noted that the employees presented no grievance to company representatives; and they refused to leave after the end of their shift when ordered to do so by management representatives and the police, thereby preventing the employer from closing the plant for the night. The court also noted that the employees had available an established grievance procedure through which they could have presented their complaints. *Id.* The court concluded that, considered in toto, the employees’ actions reflected “a complete lack of respect for their employer’s property rights” which the court did “not believe Congress intended to countenance.” *Id.* at 884.

work stoppages found protected by the Board.¹⁵ Although the work stoppage here occurred in the outside area of the Respondent's property rather than in the plant itself, we find equally applicable the principle articulated in *Cambro* that employees are entitled to persist in their protest for a reasonable period of time, after which the employer is entitled to assert its rights as to its entire premises. See 312 NLRB at 636. We find that the 12-hour duration of the employees' action here was unreasonable, particularly in view of the Respondent's attempts to respond to their concerns.

Further, although the Respondent did not have an established grievance procedure, the Respondent provided the employees multiple opportunities to present their complaints to management. Vice President Crane accepted the letter detailing the employees' demands, and President Daniel offered to meet with representatives from the group or with all of them by shift. The Respondent also made a reasonable effort to respond to the issues raised in the employees' letter. Daniel immediately agreed to correct one of the problems cited, and expressed his willingness to discuss others. However, the employees made it clear that they would not leave the premises until all of their demands were met, including a wage increase that Daniel informed them the Respondent could not grant at that time.

Further, the employees were not discharged for engaging in protected activity on the Respondent's premises. Rather, they were discharged for their refusal to leave the property after 12 hours of protest and notice of the Respondent's demand that they leave by 7:00 p.m.¹⁶

The facts of this case demonstrate that the employees were afforded a sufficient opportunity to express their complaints concerning their terms and conditions of employment. However, after many hours of protest, the employees' continued presence on the Respondent's property no longer served an immediate protected inter-

est, and the Respondent was entitled to assert its private property right. See *Cambro*, supra, 312 NLRB at 636.

Response to Dissent

Our dissenting colleague accepts the premise that the Respondent could lawfully have reclaimed its property at some point. Thus the employees' right to engage in Section 7 activity on the Respondent's property diminished over time. See *Cambro Mfg.*, supra, 312 NLRB at 635. Therefore, our disagreement with the dissent concerns whether the property right predominated after twelve hours. As noted, we find that it did.

Our colleague asserts that there is a difference between the occupation of an employer's property inside a facility and its property outside the facility. Her point has some merit. To be sure, "outside" activity is generally less disruptive than "inside" activity. Nevertheless, we believe that an employer's property right does not end at the front door, and that distinction means little where, as here, the employees were permitted to remain on the employer's premises and engage in Section 7 activities for 12 hours.

Tri-County is distinguishable. In that case, the off-duty employees involved were given no time to engage in Section 7 activity on the employer's property. In the instant case, the employees were given a sufficient amount of time to do so. Further, the off-duty employees there sought access to organize their fellow employees. By contrast, in the instant case, employees remained on the property to pressure their employer to meet with them, a demand that the Respondent was willing to meet, albeit not on all of their terms.¹⁷

Our dissenting colleague also contends that the employees had the right to stay on the Respondent's property until they had the opportunity to communicate with employees who had not yet arrived for work, a period of 24 hours. Our dissenting colleague's contention is undermined by the employees' announced purpose in remaining on the property, which is a necessary consideration in balancing the assertion of their Section 7 rights with the Respondent's property rights. It was to communicate with their *management*, not their coworkers. Contrary to the dissent, we find that the employees had an adequate opportunity to achieve that goal during the twelve hours that they remained on the premises. Therefore, their continued presence after that period was unreasonable.

Finally, our colleague says that we have destroyed labor law rights, and that she "fear[s] a continuing erosion of the Section 7 rights of unorganized workers." Such

¹⁵ See *City Dodge Center*, supra fn.5 (stoppage protected where all employees left the plant within 2 hours); *Golay & Co.* supra fn.6 (protected stoppage lasted 1 ½ - 2 hours); *Liberty Natural Products*, supra fn.10 (protected stoppage lasted 15-30 minutes); *Central Motors Corp.*, 269 NLRB 209 (1984) ("shortlived" stoppage was found protected); *Kenneth Trucks of Philadelphia*, 229 NLRB 815 (1977), enf'd. 580 F.2d 55 (3d Cir. 1978) (protected stoppage lasted ½ hour); *Benesight, Inc.*, 337 NLRB No. 40 (2001) ("brief" work stoppage protected by Sec. 7); compare *Cambro*, 312 NLRB 634 (1993) (approximately 4 hour stoppage resulted in forfeiture of Act's protection); *Waco, Inc.*, 273 NLRB 746 (1976) (3½ hour stoppage overstepped the boundary of a protected, spontaneous work stoppage).

¹⁶ Due to a translation error, some employees believed that the Respondent would call the police, rather than that it would discharge them, if they did not leave by 7:00 p.m. Regardless of this error, the employees understood that the Respondent was demanding control of its premises by the 7:00 p.m. deadline and failed to comply with that demand.

¹⁷ Under these circumstances, Chairman Battista and Member Schaumber find it unnecessary to consider the validity of *Tri-County*.

strident language is incorrect and is not useful to the resolution of difficult cases like the instant one. Consistent with the Supreme Court's direction in *Hudgens*, our analysis here is a measured effort to balance the closely competing interests involved, and our holding is confined to the particular facts of this case. Our finding the proper accommodation of the parties' interests at a different point along the continuum than does our dissenting colleague in no way justifies her alarmist predictions.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 30, 2005

Robert J. Battista,	Chairman
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Peter C. Schaumber,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

When the labor law rights of employees and the property rights of employers are in conflict, the Board's duty is to make an "accommodation" of the two rights "'with as little destruction of one as is consistent with maintenance of the other.'" *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976), quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). There can be no question that "[i]nconvenience or even some dislocation of property rights, may be necessary in order to safeguard" Section 7 rights. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 U.S. 802 fn. 8 (1945).

This case involves a peaceful work stoppage, by employees, outside (not inside) the facility where they worked. Access to the facility was not blocked, operations were not disrupted, and other employees were not interfered with. The aim of the assembled employees, who had no union and no access to a formal grievance procedure, was to present work-related complaints to their employer, not to deprive the employer of the use of its property. Acknowledging all of these facts, the majority still concludes that the employer's property rights outweighed the employees' statutory rights—to the extent that the employer was entitled to fire the workers, after they refused to leave until directed to do so by a sheriff's deputy. That balance strikes me as destroying concrete labor law rights to preserve an entirely abstract

property right, surely not the sort of careful accommodation that the Supreme Court had in mind.¹

The majority's holding turns on the conclusion that the "12-hour duration of the employees' action here was unreasonable, particularly in view of the Respondent's attempts to respond to their concerns." Because the "employees' continued presence on the Respondent's property no longer served an immediate protected interest," the majority reasons, the Respondent's right to exclude persons from its property must prevail. In other words, the statutory rights of the employees diminished over time—and, ultimately, disappeared, leaving nothing in the scales to balance against the Respondent's property right. I disagree.

I will assume that, at some point, the Respondent would have been entitled to reclaim its property. But that point was not reached in this case, even after 12 hours, if proper weight is given to the nature and context of the employees' protest.

The employees obviously intended to act together as a group, which is why they declined the Respondent's invitation to designate individual representatives. They achieved their solidarity, and communicated it to each other and to their employer, by assembling and by staying put. Their assembly "served an immediate protected interest" (in the majority's phrase) at the very least until the employees had an opportunity to communicate and join with *all* of the Respondent's employees as they arrived for work. And because the Respondent operated 24 hours a day in three 8-hour shifts, the assembly clearly was protected until employees in all three shifts (not just two) were presented with the opportunity to withhold their labor and make common cause with the assembled workers.

Such a tactic might seem extreme, not least in terms of the endurance it demands of protesting workers. But here workers presumably had serious grievances—serious enough, at any rate, that they gathered outdoors for 12 hours—and they had no union to represent them. They were required to organize themselves. The Act is intended to make that difficult goal possible. It is axiomatic that freedom of communication is essential to the exercise of employees' Section 7 right to self-organization. "Organization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and dis-

¹ We are not concerned here with access by *non-employees*, such as union organizers, whose Section 7 rights have been regarded as merely derivative of the rights of employees. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). See generally Cynthia L. Estlund, *Labor, Property, and Sovereignty after Lechmere*, 46 Stanford L. Rev. 305 (1994) (critically discussing distinction).

advantages of organization from others.” *Central Hardware v. NLRB*, 407 U.S. 539, 543 (1972).

On this view, there certainly were substantial Section 7 rights in the balance. The Respondent’s countervailing property right, in turn, was nominal, as the majority effectively concedes. The employees’ assembly, extended as it was, did no real harm: no harm to access to the property, no harm to the use of the property, and no harm to the property interest per se (a 12-hour occupation would not seem to create a claim to adverse possession). Notably, the Respondent had no prior rule limiting employee access to the parking lot where employees assembled.

None of the cases cited by the majority meaningfully support its position. Decisions involving *in-plant* work stoppages, like *Cambro* and *Waco*,² address a fundamentally different situation: such work stoppages implicate an employer’s ability to continue production and to direct employees who are on the job. A parking lot assembly is not a sit-down strike.³

Indeed, the Board’s cases recognize that, with respect to access by off-duty employees, the outside areas of an employer’s facility are distinct from inside areas. See, e.g., *Tri-County Medical Center*, 222 NLRB 1089 (1976).⁴ *Tri-County* involved the distribution of union literature, not an employee assembly. But the underlying principle—that a denial of access to outside areas must be justified by business reasons -- does apply here. The Respondent has not demonstrated that business reasons justified its discharge of the assembled workers.

The majority argues that *Tri-County* is not controlling because it involved a complete prohibition against engaging in union activity, whereas here employees were permitted to assemble for over 12 hours. That argument fails for two reasons: First, as I have argued, the time period involved here did not diminish employees’ Section 7 rights. Second, this case involves not merely a denial of access, but the discharge of employees. The majority insists that the employees “were not discharged for engaging in protected activity on the Respondent’s premises,” but rather “for their refusal to leave the prop-

erty.” That distinction, however, is illusory. Although the Respondent’s threat of discharge failed to move them, the employees left the property promptly after a sheriff’s deputy spoke to them. They were not fired until they attempted to return to work three days later. The discharge itself, then, was not a means to make employees leave the property, but rather a penalty for their past conduct.

Vindicating an employer’s property rights cannot justify punishing employees who exercise their statutory rights. Here, the majority deprives immigrant workers of a peaceful means of protest and self-organization, which did no real harm to their employer’s legitimate interests. Because the balance struck by the majority seems unreasonable, and because I fear a continuing erosion of the Section 7 rights of unorganized workers,⁵ I dissent.

Dated, Washington, D.C. June 30, 2005

Wilma B. Liebman, Member
NATIONAL LABOR RELATIONS BOARD

Tamara Gant, Esq., for the General Counsel.
James V. Carroll, III, Esq. and Mark Schwartz, Esq. (Littler Mendelson, P.C.), of Houston, Texas, for the Respondent.
Patrick M. Flynn, Esq., for the Charging Party.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on October 23, 2000, in Houston, Texas. After the parties rested, I heard oral argument, and on October 24, 2000, issued a bench decision pursuant to Section 102.35(a)(1) of the Board’s Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as “Appendix A,” the portion of the transcript containing this decision.¹ The Conclusions of Law and recommended Order are set forth below.

CONCLUSIONS OF LAW

1. The Respondent, Quietflex Manufacturing Company, L.P., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, Sheet Metal Workers Local Union No. 54, AFL–CIO, affiliated with Sheet Metal Workers Interna-

² *Cambro Mfg. Co.*, 312 NLRB 634 (1993); *Waco, Inc.*, 273 NLRB 746 (1984).

³ The Supreme Court long ago held that sit-down strikes were unprotected. See *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). There, strikers occupied two of the employer’s buildings, shutting down production, for nine days. They not only defied a state-court injunction, but also violently resisted the efforts of sheriff’s deputies to evict them. This case hardly recalls the 1930’s.

⁴ See also *ITT Industries*, 341 NLRB No. 118 (2004) (addressing access rights of off-site, off-duty employees to parking lot), enf. 2005 WL 1513091 (D.C. Cir. 2005); *Hillhaven Highland House*, 336 NLRB 646 (2001), enf. 344 F.3d 523 (6th Cir. 2003) (same).

⁵ See *IBM Corp.*, 341 NLRB No. 148 (2004) (overruling precedent and rejecting right of non-union employees to co-worker representation at disciplinary interview).

¹ The bench decision appears in uncorrected form at pages 28 through 42 of the transcript[omitted from publication]. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

tional Association, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate the National Labor Relations Act as alleged in the complaint.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended.²

ORDER

The complaint is dismissed.

APPENDIX A

JUDGE LOCKE: This is a bench decision in the case of Quietflex Manufacturing Company, L.P., which I will call the “Respondent” or the “Employer,” and Sheet Metal Workers Local Union Number 54, AFL–CIO, affiliated with Sheet Metal Workers International Union, AFL–CIO, which I will call the “Charging Party” or the “Union.” The case number is 16–CA–20257. This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board’s rules and Regulations.

The Government alleges that Respondent unlawfully discharged 83 unrepresented employees who engaged in a work stoppage. Based on the specific facts of this case, I find that this concerted activity lost the protection of the Act after the employees refused to leave the Respondent’s parking lot. Therefore, I recommend that the Complaint be dismissed.

I. PROCEDURAL HISTORY

This case began when the Union filed its initial charge against the Respondent on January 13, 2000. After investigation, the acting Regional Director of Region 16 of the National Labor Relations Board issued a Complaint and Notice of Hearing on June 30, 2000. I will refer to this document simply as the Complaint.

In issuing the Complaint, the Acting Regional Director acted on behalf of the General Counsel of the National Labor Relations Board, whom I will call the “General Counsel.” Hearing in this matter opened before me on October 23, 2000, in Houston, Texas. At the hearing, the parties entered into a written stipulation which they agreed would constitute the complete factual record in this case. The stipulation is in evidence as Joint Exhibit 1.

Also on October 23, 2000, counsel for all parties participated in oral argument. Additionally, counsel for the General Counsel and for Respondent submitted briefs. After considering the arguments and briefs, I am issuing a bench decision on October 24, 2000.

II. FACTS

Based upon the stipulation, I find that the charge and amended charges were filed and served as alleged in Complaint

paragraph 1. Additionally, I find that at all material times, Respondent has been a limited partnership, licensed to do business in the state of Texas; that it maintains an office and place of business in Houston, Texas; and that it is engaged in the manufacturing of ducts for the air conditioning industry.

Further, I find that during the 12-month period preceding this hearing, Respondent sold and shipped goods valued in excess of \$50,000 directly to points outside Texas. I find that Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act, as alleged in Complaint paragraph 4.

Based on the stipulation of the parties, I also find that the Charging Party is now and has been at all material times a labor organization within the meaning of Section 2(5) of the Act as alleged in paragraph 5 of the Complaint.

Respondent has stipulated and I find that the following individuals are its supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act, as alleged in Complaint paragraph 6: President and Chief Executive Officer W.A. Dan Daniel, Jr.; Vice President Pete Crane; Manager of Human Resources Steve Conaway; and Supervisor Jaime Salinas.

Complaint paragraph 6 also alleges that assistant human resources manager Karima Cousinmono is a supervisor of Respondent and its agent. The parties have not stipulated that these allegations are true, and the record otherwise does not support them. Therefore, I find that the Government has not established either the supervisory or agency status of this individual.

Complaint paragraph 7 alleges that 83 employees identified in the Complaint by name ceased work concertedly on or about January 10, 2000, to seek redress concerning wages, hours, and working conditions. In the stipulation, the Respondent admits this allegation to be true. The stipulation also corrects the spelling of the name of one of the 83 employees.

Based on the parties’ stipulation, I find the following facts concerning the employees’ concerted refusal to work: The Respondent’s workforce is predominantly of Hispanic and Vietnamese origin. About 7:00 a.m. on January 10, 2000, the 83 employees named in the Complaint paragraph 7 congregated together in the parking lot area and waited for the arrival of either Respondent’s President Daniel or Vice President Crane.

These 83 employees have Hispanic surnames. They had become concerned that the employees with Vietnamese surnames were receiving more pay and better treatment than the Hispanic employees. Additionally, the employees who stopped work on January 10 sought a pay raise, improved vacation and holiday pay, elimination of perceived discrimination, and other matters related to working conditions.

At this time, no labor organization represented these employees. I find that they were acting in concert for their mutual aid and protection, and that they sought changes in wages, hours, and other terms and conditions of employment.

Vice President Crane arrived about 7:15 a.m. and told the employees that he wanted them to go to work. One of the employees gave Crane a letter describing the employees’ demands. Crane told the employees that they would have to speak with Respondent’s president.

² If no exceptions are filed as provided by Section 102.46 of the Board’s Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

About 8:30 a.m. that same day, Human Resources Manager Conaway asked the employees what was happening. They gave Conaway a copy of the same letter they had given Vice President Crane, and told Conaway that Crane knew what was going on. Although Conaway asked four or five of the employees to go inside and speak with a manager, they declined, saying that they wanted the communications to be with all of the employees.

Around 11:00 a.m. on January 10, Respondent's President Daniel, Human Resources Manager Conaway, and a supervisor went together to the employees who were still outside. Daniel told the employees that he had their letter of demands. Addressing one of those demands, the managers informed the employees that they had found someone to clean the lunch room and bathrooms.

Respondent customarily conducted meetings for each shift of employees twice a year, and one of those meetings was approaching. President Daniel offered to schedule this meeting about a week sooner by moving it to January 12, apparently to give the employees an earlier opportunity to voice their concerns. He also offered to meet with the employees in shifts at that time, presumably to discuss their demands. However, the employees refused.

President Daniel also offered to meet immediately with delegates of the 83 employees. However, the employees refused, explaining that they wanted to remain together. They also stated that they wanted their demands met. Daniel said that he could not meet their salary demand, either then or later, but other things could be discussed, and noted that some of the demands were unclear to him.

During this exchange between President Daniel and the 83 employees, he also told them that they either needed to return to work or leave the Company's premises. The employees stated that they would neither go to work nor leave unless the Employer agreed to all of the employees' demands.

The employees remained assembled on the Respondent's parking lot. At about 6:15 p.m. on January 10, Daniel again spoke to them. Again he offered to meet with delegates of the group immediately or with all employees grouped by shifts two days later. The employees refused both offers.

Daniel asked if they were demanding a \$7-per-hour raise and his agreement to all of the demands before they would return to work, and the employees said that they were. Daniel further said that he understood that unless he agreed to all of their demands, they were refusing to leave, and the employees agreed that his understanding was correct.

Daniel then read to the employees a statement in English which began by summarizing the events of that day. The statement then continued as follows: "The employees who are engaged in this work stoppage are hereby notified that they must leave the Company's premises by 7:00 p.m., January 10, 2000. Any employee who is refusing to return to work and refuses to leave the Company's premises, which include the Company's parking areas, by 7:00 p.m. January 10, 2000, will be discharged.

"We emphasize that such employees will not be discharged because they refused to work but because they refused to leave the Company's premises. Any employees who are discharged

will lose any and all benefits of their employment with the Company, including their health benefits."

A Spanish-speaking supervisor provided an oral translation, but it was not verbatim. The supervisor told the employees in Spanish that Daniel said they must leave the Company's premises by 7:00 p.m. and that if they did not do so, the Company would call the police. However, the supervisor did not tell the employees in Spanish that they would be discharged if they failed to leave the premises.

Shortly after 7:00 p.m. when the employees remained on the Respondent's premises, the Respondent called the sheriff's department. A sheriff's deputy arrived about 7:15 and spoke in Spanish with the employees, who then left the Respondent's premises within a few minutes.

The work stoppage lasted about 12 hours. Throughout, the employees remained in essentially the same location, which was a parking lot area. Although trucks came through this area to deliver and pick up goods, the employees did not stop the trucks from entering or leaving. Because all of the employees in Respondent's duct department participated in the work stoppage, the Company produced no finished ducts on January 10, 2000. However, the record does not indicate and I do not find that the employees made any attempts to interfere with production, except by concertedly withholding their services.

On January 11, 2000, these employees gathered at a roadside near but not on Company premises. President Daniel, accompanied by some others in management, went to the employees and told them they had been fired the previous evening. Daniel asked them to turn in their uniforms and told them that their paychecks would be mailed to them.

On January 12, 2000, the Respondent received by facsimile an unconditional offer to return to work, signed by several of the discharged employees. Additionally on January 13, 2000, several of the discharged employees tried to return to work, but were not allowed to do so and left the premises.

On January 13, 2000, President Daniel sent a letter to all the employees involved in the work stoppage, stating that they had been discharged for violating its instructions to leave the Company's property. However, Daniel later reconsidered the action to terminate the employment of these workers, after he received information suggesting that many of the employees were confused or may not have understood the instructions he gave the employees on January 10.

On January 21, 2000, Daniel sent a letter to each of the discharged employees, offering each an opportunity to return to work on January 24, 2000, under the same conditions of employment. All 83 employees returned to work and have continued to be employed by Respondent. However, Respondent has not paid the employees for the time lost before reinstatement. The parties further stipulated and I find that as of January 10, 2000, Respondent maintained no rules or policies prohibiting off-duty employees access to its parking lots and had never disciplined employees for being in the parking lot. Additionally the parties stipulated that on January 10, 2000, the outside perimeter of the property was unfenced.

III. ANALYSIS

The General Counsel contends that the facts of this case must be analyzed under the standard articulated in *Tri-County Medical Center*, 222 NLRB 1089 (1976). The Board found that the Respondent in that case violated Section 8(a)(1) by preventing an off-duty employee from distributing union literature outside its facility. Additionally in this case, the Board articulated a test for determining whether an employer's rule barring off-duty employees from its facility would be lawful.

Significantly, in *Tri-County Medical Center*, the Board stated that except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid. The General Counsel relies on this principle to distinguish the present facts from a work stoppage in which employees occupy plant areas and impede production. Such a work stoppage, sometimes called a "sit-in strike" or "sit-down strike" does not enjoy the Act's protection.

The General Counsel argues that the work stoppage itself began as protected activity and that it could not lose the Act's protection when the striking employees did what the law allowed them to do, namely to use the Employer's parking lot as the location for concerted activity.

Under the government's theory, the Respondent could not issue such a restriction unless it had a business reason to do so, and the Respondent has not demonstrated any such business reason. To the contrary, the Respondent had never issued a rule restricting employee access to the parking lot, which suggests it would have no business need for such a rule.

In sum, the General Counsel argues, the Act gives employees a right of access to the Employer's parking lot. Considering that they enjoyed such a right of access, the employees could not lawfully be disciplined for exercising that right. Doing so, the General Counsel contends, interferes with, restrains, and coerces employees in the exercise of rights protected by Section 7 of the Act.

Respondent relies on a different line of cases. In particular, it bases its defense on *Waco, Inc.*, 273 NLRB 746 (1984) and *Cambro Manufacturing Company*, 312 NLRB 634 (1993). These cases arose when groups of employees not represented by any union concertedly stopped work to press for job-related demands. In each instance, the employees occupied a nonworking portion of their employer's facility and refused to leave when told to do so. In the circumstances of each of these two cases, the Board found that the Employer did not violate the Act by discharging the employees for refusing to leave.

To the extent that the *Waco* and *Cambro* cases conflict with the *Tri-County Medical Center* case cited by General Counsel, I believe that *Waco* and *Cambro* must control. For one thing, the facts of the present case are much more similar to the facts in *Waco* and *Cambro* than to the facts in *Tri-County Medical Center*, which concerned handbilling rather than an employee work stoppage.

Additionally, both *Waco* and *Cambro* are more recent cases than *Tri-County Medical Center*. The Board decided *Waco* eight years after it decided *Tri-County Medical Center*. It decided *Cambro* 16 years after *Tri-County Medical Center*. Thus, if the Board had wished to apply the *Tri-County Medical*

Center principle to work stoppages, it had the opportunity to do so, but did not take that opportunity.

In *Cambro*, when the unrepresented employees began their work stoppage, they enjoyed the Act's protection. However, the Board found that the employees' actions became unprotected after a supervisor told them for the second time to return to work or to leave the Respondent's property. The Board concluded that

Further in-plant refusals to work serve no immediate protected employee interests and unduly interfered with the Employer's right to control the use of its premises. Accordingly, the Respondent could lawfully discharge the eleven employees for continuing their in-plant work stoppage.

Significantly in *Cambro*, the Board balanced the employees' right to engage in protected concerted activity on their employer's premises against the employer's right to control these premises, not against the employer's right to make products. The Board did not hold that the protesting employees could stay on the company's property indefinitely, as long as they did not disturb production. Rather, the Board held that these employees only had the right to stay on company property long enough to exercise their Section 7 rights in a meaningful way.

To be exact, the Board did not use the phrase, "in a meaningful way," and those words are not a term of art defining how long protesting employees may stay on the employer's premises over the employer's objection. Rather, the *Cambro* decision recognized that at some point, the employees' right of access must yield, because continued access at that point "served no immediate protected employee interest."

Certainly if the presence of the protesting employees caused a disruption to production, it could forfeit the protection of the Act, but where there is no such interference with production, the nonworking employees enjoy a right of access only until such access no longer served immediate protected employee interests.

In *Cambro*, that point came when the protesting employees refused the supervisor's second instruction to return to work or leave the premises. At this point, the Board found, "The Respondent was entitled to reclaim the use of the entire premises."

In the present case, management told the protesting employees at least twice to go to work or leave the premises. At about 11:00 a.m., after the work stoppage had been going on about five hours, Respondent's president told the employees, "that they either needed to return to work or leave the Company's premises."

Sometime after 6:15 p.m., in the eleventh hour of the work stoppage, Daniel read a statement to the employees which notified them that at 7:00 p.m., any employee who refused to return to work and also refused to leave the premises would be discharged for refusing to leave the premises.

The record does not disclose how many of the 83 employees understood English. However, a supervisor also told them in Spanish that they must leave the premises by 7:00 p.m. or the Employer would call the police. Although this statement did not threaten discharge, I do not believe that fact is determinative. The message was clear even without the words "or else you will be fired."

The employees in the present case had far longer to make their protests clear than did the employees in *Cambro*. Twice they spoke with the Respondent's highest ranking official who offered to meet with a delegation of them or, alternatively, to have meetings with all of them on a shift-by-shift basis two days in the future.

The employees also presented a letter stating their demands. Clearly the record establishes that the Respondent's highest management read this letter, began action to address some of those demands, and considered the others. As the Board held in *Cambro*, the employees here were entitled to persist in their concerted protest on the Respondent's property for a reasonable period of time. In the circumstances of this case, I concluded that they continued to refuse to leave the Respondent's property beyond this reasonable period of time.

Further, I conclude that their continued presence on the Respondent's property after the second time they were told to leave or return to work served no immediate protected employee interest and unduly interfered with the Employer's right

to control the use of its premises. Therefore, I find that at this point, their concerted action lost the protection of the Act.

The record established that Respondent discharged these employees not because they refused to work but because they refused to leave Respondent's property. Therefore, I find that Respondent's discharge of these employees did not interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act, and I recommend that the Complaint be dismissed.

After I have received the transcript of this proceeding, I will prepare a certification which will attach the transcript of this bench decision as an appendix. This "Bench Decision and Certification" will be served on the parties, and upon such service, the time period for filing an appeal will begin to run.

Counsel in this case have demonstrated extraordinary cooperation and civility, even reaching a stipulation of the entire factual record. I am impressed, and I greatly appreciate it.

The hearing is closed.